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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VANDERVEER LENORA,

Defendant and Appellant.

D051304

(Super. Ct. No. SCD199414)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed as modified.

Vanderveer Lenora appeals from a judgment convicting him of transporting cocaine base (count one), selling cocaine base (count two), and possessing cocaine base for sale (count three), with true findings that he had incurred prior drug-related convictions requiring enhancement of his sentence under Health and Safety Code section 11370.2, subdivision (a). He contends the trial court erred in denying his pretrial motion for discovery to determine if the procedures used by the San Diego County Jury

Commissioner's office (the County) for summoning jurors conformed with his constitutional right to a jury drawn from a cross-section of the community. He also argues the trial court erred in failing to: (1) stay his sentence for count two under Penal Code section 654; (2) strike the Health and Safety Code section 11370.2 enhancements for counts two and three; and (3) hold a hearing to address his postconviction assertion that he had been provided ineffective representation at trial.<sup>1</sup>

We find no reversible error, except we modify the judgment to strike the Health and Safety Code section 11370.2 enhancements for counts two and three. As so modified, the judgment is affirmed.

#### FACTUAL AND PROCEDURAL BACKGROUND

On June 1, 2006, Officer Dan Wilson was working undercover in a drug "buy-bust" operation in the downtown area of San Diego. At about 11:00 p.m., he told a man (Mark Esser) that he was looking for "'a 20,'" which meant \$20 worth of rock cocaine. Officer Wilson gave Esser a \$20 bill that had been previously photocopied by the police.

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<sup>1</sup> In this appeal Lenora additionally raised an issue regarding custody credits. At sentencing, he had requested a recalculation of the credits by the probation officer. On appeal he requested that we adjust the credits based on the probation officer's postsentencing recalculation. The Attorney General requested that we remand the matter for a hearing before the trial court. After the appellate briefing was completed, Lenora submitted a letter informing us that the trial court had corrected the custody credits in an ex parte minute order dated November 26, 2008. At oral argument for this appeal, the Deputy Attorney General questioned whether proper procedures were followed in conjunction with the ex parte minute order. If there are concerns in this area, they should be presented to the trial court for resolution in the first instance. (See *People v. Salazar* (1994) 29 Cal.App.4th 1550, 1557; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

Officer Wilson walked with Esser around the neighborhood as Esser made contact with several people to inquire about buying the narcotics. After about 10 minutes, Officer Wilson noticed a woman (Francine Johnson) driving a Jeep with a male passenger (Lenora) in the front seat. Johnson parked the Jeep on 15th Street, and she and Lenora exited and stood by the vehicle. Esser approached Lenora and spoke to him. Officer Wilson saw Lenora move his head to direct Esser to Johnson. Esser handed the money to Lenora. Esser and Officer Wilson then approached Johnson. Johnson retrieved rock cocaine from her shirt and gave it to Esser, and Esser put the drugs in his pocket.

After Esser and Officer Wilson walked away from the vehicle and crossed the street, Esser gave the drugs to Officer Wilson. Officer Wilson then gave a signal for other members of the police narcotics team to effectuate the arrests.

Responding to the signal relayed by Officer Wilson, uniformed Officer Michael Day drove his police vehicle to the scene. As Officer Day was handcuffing Johnson, he saw Lenora place something under the bumper of the Jeep. When Officer Day looked under the bumper, he found a baggie containing four pieces of rock cocaine and the prerecorded \$20 bill. When searching Lenora, Officer Day found \$401 cash and two cell phones. The four pieces of rock cocaine found under the bumper were worth about \$20 per rock. Prosecution experts opined that the four pieces of rock cocaine were possessed for sale.

Lenora was convicted of transporting cocaine base (count one), selling cocaine base (count two), and possessing cocaine base for sale (count three), with true findings on several enhancements. He was sentenced to 10 years in prison.

## DISCUSSION

### I. *Jury Venire Issue*

A defendant has a constitutional right to a jury drawn from a representative cross-section of the community. (*People v. Anderson* (2001) 25 Cal.4th 543, 566.) This guarantee "mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community." (*Ibid.*) To raise a claim of systematic exclusion of a cognizable group in the jury pool or venire, the defendant must file a pretrial motion and make a prima facie showing of the constitutional violation. (See *People v. Fauber* (1992) 2 Cal.4th 792, 816; *People v. Jackson* (1996) 13 Cal.4th 1164, 1194.)<sup>2</sup> To assist with establishment of a prima facie case, a defendant is entitled to discovery of information relevant to the jury selection procedures upon a showing of a reasonable belief of a constitutional violation. (*People v. Jackson, supra*, 13 Cal.4th at p. 1194.) Here, Lenora filed a pretrial discovery motion to investigate various theories of systematic exclusion identified by a defense expert. The trial court denied his motion. Lenora now challenges this ruling on appeal. We find no error.

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<sup>2</sup> In this opinion, we use the term "pool" to refer to the group of jurors on the master jury list who are sent summonses, and the term "venire" to refer to the group of persons who report for service for assignment to a panel. (See *People v. Bell* (1989) 49 Cal.3d 502, 520, fn. 3.)

### *A. Background*

In September 2006, prior to trial, Lenora filed a motion requesting discovery pertaining to the County's procedures for summoning jurors.<sup>3</sup> The same discovery motion had been filed in two other unrelated cases pending before different judges. To avoid duplicative evidentiary hearings, the parties agreed to submit the transcripts and declarations presented in those cases for the trial court's consideration when ruling on Lenora's discovery motion.<sup>4</sup>

This information included the results of a survey performed by demographics expert Dr. John Weeks suggesting underrepresentation of Hispanics and Asians in the jury venire; a description of the County's procedures for summoning jurors; and Dr. Weeks's theories supporting the defense claim that discovery was needed to investigate the causes of the underrepresentation.<sup>5</sup>

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<sup>3</sup> Lenora requested discovery of a wide variety of matters pertaining to the jury selection procedures including copies of the lists used to summon jurors, a list of persons who reported for service, a list of persons who remained for service, a list of persons who were excused or excluded and the reasons for the exclusion, the written or oral procedures by which jurors are excused, and a list of persons who failed to respond to summonses.

<sup>4</sup> Lenora had also requested that his discovery motion be consolidated with the discovery motion filed in one of the other pending cases, but the trial court denied his request.

<sup>5</sup> The People presented the testimony of expert Dr. Michael Sullivan to respond to Dr. Weeks's theories. For purposes of evaluating whether Lenora made the showing required to obtain discovery, we need not detail Dr. Sullivan's testimony.

### 1. *Evidence of Underrepresentation*

To investigate underrepresentation, Dr. Weeks randomly selected 100 jurors from the jurors who reported for duty on September 18 and 19, 2006, at the downtown branch of the Superior Court (where Lenora was being tried). Using surnames, he found 12 percent Hispanic names and 6 percent Asian names on September 18, and 9 percent Hispanic names and 8 percent Asian names on September 19. Census figures for 2005 showed San Diego County's jury-eligible population to be 19 percent Hispanic and 10 percent Asian. Combining the results from the two days, Dr. Weeks concluded that this showed (1) an absolute disparity of 8.5 percent for Hispanics and 3 percent for Asians, and (2) a relative disparity of 45 percent for Hispanics and 30 percent for Asians.<sup>6</sup>

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<sup>6</sup> Absolute disparity is calculated by subtracting the group's percentage in the venire from the group's percentage in the population. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 564, fn. 6.) Relative (or comparative) disparity—which measures the "percentage decrease in the probability" of a member of the group being in the venire—is calculated by dividing the absolute disparity by the group's percentage in the population, and then multiplying the result by 100. (Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel* (1994) 103 Yale L.J. 1913, 1918; *In re Rhymes* (1985) 170 Cal.App.3d 1100, 1104-1105 [43 percent comparative disparity means group member "would have a 43 percent lesser chance of being on the jury panel . . . than the percentage of [the group members] in the population would suggest"]; *People v. Anderson*, *supra*, 25 Cal.4th at pp. 564-565, fn. 6; *People v. Ochoa* (2001) 26 Cal.4th 398, 427, fn. 4; *People v. Breaux* (1991) 1 Cal.4th 281, 297, fn. 3.) The California Supreme Court has not adopted any one statistical methodology, but it has variously noted that the comparative disparity test is both favored and disfavored, and it has recognized that the courts routinely use the absolute disparity test. (See *People v. Burgener* (2003) 29 Cal.4th 833, 860; *People v. Bell*, *supra*, 49 Cal.3d at pp. 527-528, fn. 14; *People v. Sanders* (1990) 51 Cal.3d 471, 492, fn. 6; *People v. Morales* (1989) 48 Cal.3d 527, 544.)

## *2. The County's Procedures for Summoning Jurors*

As authorized by Code of Civil Procedure section 197, subdivision (b), the County uses the list of registered voters and the Department of Motor Vehicles (DMV) list of licensed drivers and identification cardholders as its source list for selection of prospective jurors. Twice a year, these lists are submitted to a third party vendor, Jury Systems Incorporated (JSI). JSI merges the two lists and extracts any duplicates from the list (the merged-purged list). In 2005 and 2006, the merged-purged list had about 2.5 million names on it. The list is then revised to eliminate individuals who have been permanently or temporarily excused, who are deceased, and who have recently served as jurors. This creates the master jury list which is used to mail the summonses to prospective jurors. In 2005 and 2006, there were about 800,000 names on the master jury list.

In October 2006, the County changed its system for compiling the master jury list. It decreased the categories of permanent excuses and shortened the period of time for an excuse based on recent jury service. This resulted in 2.5 million names on the merged-purged list after the elimination of duplicates, and 1.2 million names on the master jury list after the suppression of the additional categories of persons (i.e., permanently and temporarily excused persons, deceased persons, and persons who had recently served).<sup>7</sup>

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<sup>7</sup> Persons who are suppressed prior to the creation of the master jury list because they responded to a summons with a temporary excuse are later reloaded into the system and can again be sent summonses after about 12 to 18 months.

In addition to the persons removed prior to the creation of the master jury list, prospective jurors may be excused after they are mailed summonses. An individual who receives a summons may request an excuse for undue hardship as authorized by the Code of Civil Procedure and defined in California Rules of Court, rule 2.1008(d).<sup>8</sup> These excuses are reviewed by Superior Court staff. If the excuse is one permitted under the Code of Civil Procedure and California Rules of Court, it is granted; if not, the prospective juror is sent a "kickback" letter requiring the person to report for service. If a person does not request an excuse or appear for service, the County performs no follow-up to try to secure the person's attendance.

Summonses for service at the downtown central division courthouse are sent on a county-wide basis by zip code. In contrast, summonses for the other county courthouses (including the South Bay courthouse) are sent only to persons residing in or near that area of the county. A person who completed jury service at the South Bay courthouse would be excused from jury service at the downtown location for a 12-month period.

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<sup>8</sup> The Code of Civil Procedure provides that "[a]n eligible person may be excused from jury service only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council." (Code Civ. Proc., § 204, subd. (b).) The Judicial Council has set forth the list of authorized hardship excuses in California Rules of Court, rule 2.1008(d). These undue hardship excuses include the prospective juror's lack of transportation to the court, excessive traveling distance from the prospective juror's home to the court, extreme financial burden on the prospective juror, undue risk of injury to the prospective juror's property, the prospective juror's physical or mental disability, immediate need for the prospective juror's services for protection of public health and safety, or the prospective juror's obligation to provide care to a dependent or child. (Cal. Rules of Court, rule 2.1008(d).)

In 2005, 65 percent of the people who were sent summonses were granted excusals from, or postponement of, jury service. Out of the remaining 35 percent of eligible prospective jurors, 39 percent actually appeared for service. This number represents 13 percent of the people who were originally sent summonses.<sup>9</sup>

### *3. Dr. Weeks's Theories Regarding Underrepresentation*

Dr. Weeks identified several factors that he viewed as suggesting the County's procedures systematically excluded cognizable groups and created a disparity in their representation on the venire. The issues he identified were whether (1) JSI did not adequately remove duplicate names when it compiled the merge-purge list, (2) the high number of excuses that were granted and the high number of people who failed to respond in any fashion to the summonses created a nonrandom system, and (3) the higher percentage of Hispanics in the population in the southern portion of the county resulted in service of Hispanics at the South Bay courthouse at the expense of service of Hispanics at the downtown courthouse. Dr. Weeks posited that discovery was needed to investigate these hypotheses.

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<sup>9</sup> These percentages (calculated by Dr. Weeks) were derived from the following data submitted by the County. In 2005, 984,261 persons were sent summonses. Of these 984,261 individuals, 595,106 persons requested and were granted excuses and 48,935 persons requested and were granted postponements. After these excuses and postponements, 340,220 persons remained available for jury service. Of these 340,220 individuals, 132,087 appeared for service; 208,200 failed to appear or respond; and 67 were carried over to 2006.

a. *Inadequate Elimination of Duplicates*

Dr. Weeks testified that there are approximately 2 million people in San Diego County age 18 and older, but that the merged-purged list (i.e., the merged DMV/voter registration list after the duplicates were removed) contains 2.5 million names. This overreporting suggests that duplicate names are not being adequately purged, probably because of slight differences in the spelling of names or other such discrepancies between the two lists. According to Dr. Weeks, this in turn creates a potential disparity problem for cognizable groups. Dr. Weeks opined that because Hispanics and Asians are less likely to be registered to vote, they are less likely to be duplicated on the merged-purged list and thus have a lower probability of being sent summonses. In contrast, non-Hispanics and non-Asians who do regularly register to vote have a higher probability of being duplicated and hence a higher probability of being sent summonses. He stated discovery was needed to determine if duplicates were being properly eliminated.

b. *Excuses and Failures to Respond*

When evaluating the number of people who actually reported for jury duty, Dr. Weeks identified potential problems with the County's excuse procedures. He noted that there were 2.5 million names on the merged-purged DMV/voter registration list, but only about 800,000 on the master jury list used to send out the summonses. He opined that dropping this many names for permanent and temporary excuses suggested a disparity in a cognizable group might be created, and that data was needed to evaluate this issue. He acknowledged that the County had recently implemented changes that increased the number of people on the master jury list from approximately 800,000 to 1.2 million.

However, he stated that although this would increase the number of people who were sent summonses, he did not expect that it would change the number of people who responded to the summonses.

Further, Dr. Weeks opined that because only 13 percent of the prospective jurors who were sent summonses actually reported for service, the County's jury selection process "systematically undermines random procedures and is very unlikely to produce a jury [venire] that is representative of the jury-eligible population in San Diego County." Further, the fact that only 39 percent of the people who are left in the jury pool after excuses were granted actually reported for service likewise reflects "a response rate [that] is way too low to ensure randomness and thus representativeness in the jury [venire]."<sup>10</sup>

Dr. Weeks questioned the high number of excuses that were granted when jurors responded to the summonses sent to them. He stated the fact that 65 percent of people who were sent summonses were excused was "an extraordinary statistic."<sup>11</sup> He opined that it was highly unlikely that such a large proportion of people in San Diego County actually qualified under the Code of Civil Procedure for excuses.

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<sup>10</sup> Initially, Dr. Weeks was provided with information indicating that only 9 percent of the prospective jurors who were sent summonses actually showed up for service. When he was given the corrected information reflecting a 13 percent show-up rate of the total people summoned, and a 39 percent show-up rate of the people summoned after requested excuses and postponements were granted, he stated these increased figures did not alter his opinion that the system was likely to systematically exclude cognizable groups.

<sup>11</sup> The record shows that this 65 percent figure actually includes persons who were granted postponements as well as excuses. That is, 60 percent were granted excuses and 5 percent were granted postponements. (See fn. 9, *ante*.)

Dr. Weeks posited that it was likely people who temporarily excuse themselves (for example because they have dependent care obligations or financial hardships) are lower income persons, but that discovery data was needed to examine this. He also opined that permitting people to "self-select" out of jury duty through temporary excuses created a nonrandomness in the system and created a potential disparity between the demographics expected from a cross-section and the people who actually report for duty.

Regarding the 39 percent response rate, Dr. Weeks explained that research in the field suggested that when a county has a high nonresponse rate, there is a high likelihood that the respondents will not be representative of the entire group to whom summonses have been sent, which means some cognizable groups would be disproportionately underrepresented. He stated the research literature showed that the people who are least likely to respond to jury summonses are younger and lower-income individuals, and that in San Diego County Asians and Hispanics are younger and Hispanics are lower income relative to other groups. He opined that "any system that does not attempt to follow-up with these no-shows will systematically exclude a disproportionate share of the two cognizable groups of Hispanics and Asians, leading to a biased (non-random) jury [venire]."

Dr. Weeks suggested the nonresponse problem could be corrected by using follow-up procedures to strive for a 100 percent response rate, for example by mailing multiple follow-up summonses, and randomly selecting and targeting a smaller number of people to make sure they show up. He stated that discovery was needed to obtain information to determine whether members of cognizable groups were not responding,

for example by conducting surveys at the courthouse to ascertain the demographics of jurors showing up and then comparing the results to the jury-eligible population.

*c. The Effect of the Hispanic Population Density in the South Bay*

Dr. Weeks stated that there is a higher concentration of Hispanics in the southern area of the county. Because summonses are not sent out based on population densities, it was likely that Hispanics were performing their service at a higher rate at the South Bay courthouse than at the downtown central courthouse. Discovery was needed to verify this hypothesis.

*4. Trial Court's Ruling*

After considering the information submitted by the parties, the trial court denied Lenora's discovery motion, concluding that he had not carried his burden to show a reasonable belief that underrepresentation existed because of systematic exclusion.

*B. Governing Legal Principles*

When evaluating whether there is a constitutional violation based on the deprivation of the fair cross-section guarantee, the courts require that the defendant make a prima facie showing of his or her claim, which, if made, then shifts the burden to the People to dispel the claim. (*People v. Jackson, supra*, 13 Cal.4th at p. 1194.) However, when a defendant is merely seeking *discovery* of information needed to make the prima facie case, the defendant need only show a reasonable belief of a constitutional violation. (*Ibid.*) We shall first set forth the standards governing the defendant's prima facie showing, and then determine whether Lenora has met the lesser showing required to obtain discovery to investigate the jury cross-section issue.

To establish a prima facie violation of the cross-section requirement a defendant must show three factors: (1) the excluded group is a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process. (*People v. Jackson, supra*, 13 Cal.4th at p. 1194.) If the defendant makes the required prima facie showing, the burden shifts to the People to either present a more precise statistical showing that no constitutionally significant disparity exists or that there was a compelling justification for the procedure that justifies the disparity. (*Ibid.*)

Mere statistical evidence showing underrepresentation does not suffice to establish a prima facie constitutional violation. (*People v. Howard* (1992) 1 Cal.4th 1132, 1160.) Rather, to meet the second prong of the prima facie test, the statistical evidence must show a disparity that is large enough to be considered constitutionally significant. (See *People v. Bell, supra*, 49 Cal.3d at pp. 526-528, & fn. 15; *People v. Sanders, supra*, 51 Cal.3d at p. 492; *People v. Ramirez* (2006) 39 Cal.4th 398, 446.) Further, to meet the third prong, the defendant must show "the disparity is the result of an improper feature of the jury-selection process." (*People v. Howard, supra*, 1 Cal.4th at p. 1160; *People v. Ayala* (2000) 23 Cal.4th 225, 256.)

A constitutional violation arising from an improper feature is readily apparent if a jury selection process uses a *nonneutral criterion* that *directly causes* the disparity; for example, if a county permits all women to be exempted from jury duty. (See *People v. Morales, supra*, 48 Cal.3d at p. 546; *United States v. Rodriguez-Lara* (9th Cir. 2005) 421

F.3d 932, 944-945 [examples of improper features include system that allowed women to opt out of service more easily than men; system where computer error excluded individuals from two regions with high proportion of ethnic minorities; and system that selected jurors on wholly subjective criteria].) In contrast, when a defendant claims disparity caused by *the application of facially neutral criteria*, the defendant has a higher burden to show a prima facie constitutional violation. As stated in *Jackson*, when "a county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion, more is required to shift the burden to the People. The defendant must identify some aspect of the manner in which those criteria are being applied that is: (1) the probable cause of the disparity, and (2) *constitutionally impermissible*." ( *People v. Jackson*, *supra*, 13 Cal.4th at p. 1194, italics added; *People v. Sanders*, *supra*, 51 Cal.3d at p. 493.)<sup>12</sup>

A jury selection process that uses neutral criteria is not considered constitutionally impermissible in its application merely because it "may . . . operate to permit the de facto exclusion of a higher percentage of a particular class of jurors that would result from a random draw." ( *People v. Danielson* (1992) 3 Cal.4th 691, 706, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Although there may be circumstances where a defendant can show a prima facie

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<sup>12</sup> Lenora questions the propriety of this "constitutionally impermissible" standard, stating that he has not found federal authority using this standard. (See *United States v. Rodriguez-Lara*, *supra*, 421 F.3d at p. 945, fn. 13.) Regardless of the standards used by federal courts, absent contrary direction from the United States Supreme Court, we follow the California Supreme Court's interpretation of the fair cross-section standards.

constitutional violation in the application of neutral criteria, there is no blanket constitutional requirement that a county take extra measures, beyond the use of neutral criteria, to ensure that a cross-section of the community is available for jury service. (See *People v. Bell*, *supra*, 49 Cal.3d at pp. 530-531; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 427-428; *People v. Burgener*, *supra*, 29 Cal.4th at pp. 857-858; *Roddy v. Superior Court* (2007) 151 Cal.App.4th 1115, 1134.)

As explained in *Bell*, a county is not required "to *create* venires that reflect a representative cross-section of the population. The [Constitution] forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection procedure be supplemented to achieve the goal of selection from a representative cross-section of the population." (*People v. Bell*, *supra*, 49 Cal.3d at p. 530.) That is, the Constitution does not require "'venires to be, statistically, a substantially true mirror of the community. . . . While courts often speak in terms of 'fair cross section,' they have realized that practical reasons, as well as the sterility of such endeavor, militate against total realization of this ideal. . . . Because a true cross section is practically unobtainable, courts have tended to allow a fair degree of leeway in designating jurors so long as the state or community does not *actively* prevent people from serving or actively discriminate, and *so long as the system is reasonably open to all.*'" (*United States v. Cecil* (4th Cir. 1988) 836 F.2d 1431, 1445-1446.)

When evaluating whether a defendant has shown a *prima facie* constitutionally impermissible application of neutral criteria, the courts have recognized that disparities due to economic, cultural, social, or language considerations may be unavoidable.

(*People v. Morales, supra*, 48 Cal.3d at p. 547.) The courts have identified several factors that generally tend *not* to rise to the level of a constitutional violation when a disparity exists notwithstanding the use of neutral criteria in the jury selection process. For example, a county is generally not expected to correct disparities arising from a group's failure to register to vote (*People v. Ochoa, supra*, 26 Cal.4th at pp. 427-428) or arising from a group's reliance on hardship excuses (*People v. Howard, supra*, 1 Cal.4th at p. 1160; *People v. Danielson, supra*, 3 Cal.4th at p. 706; *People v. Burgener, supra*, 29 Cal.4th at pp. 857, 862).

When a defendant is seeking *discovery* of information needed to make the required prima facie showing, the defendant's motion is governed by a lesser standard. (*People v. Jackson, supra*, 13 Cal.4th at p. 1194.) Drawing from the "reasonable belief" standard used for *Pitchess*<sup>13</sup> motions, the *Jackson* court defined this lesser showing as requiring "a particularized showing *supporting a reasonable belief* that underrepresentation in the jury pool or the venire exists as the result of practices of systematic exclusion." (*People v. Jackson, supra*, 13 Cal.4th at p. 1194, italics added; see *Gause v. United States* (D.C. Ct. App. 2008) 959 A.2d 671, 684-685 [*Jackson* discovery standard is akin to "reasonable 'articulable suspicion' " standard].) If this showing is made, the trial court "must make a reasonable effort to accommodate the defendant's relevant requests for information designed to verify the existence of such underrepresentation and document its nature and

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<sup>13</sup> *Pitchess* motions concern requests for discovery of information in police officer personnel records. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

extent." (*People v. Jackson, supra*, 13 Cal.4th at p. 1194.)

Although the parties generally agree on the law governing discovery motions based on the fair cross-section requirement, they dispute the applicable standard of review on appeal from the denial of the discovery motion. Lenora argues for de novo review, whereas the People contend the abuse of discretion standard applies. Because the discovery issue requires an evaluation of whether the facts raise a possible constitutional violation, we will assume *arguendo* that it presents a mixed question of law and fact that is properly subject to independent review to the extent the facts are undisputed. (See *United States v. Miller* (9th Cir. 1985) 771 F.2d 1219, 1227 [challenge based on constitutional cross-section requirement reviewed de novo]; cf. *People v. Salazar* (2005) 35 Cal.4th 1031, 1042 [claim of *Brady*<sup>14</sup> violation for failing to disclose exculpatory evidence subject to independent review]; *People v. Cromer* (2001) 24 Cal.4th 889, 894; but see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228 [*Pitchess* discovery ruling reviewed for abuse of discretion].)

### C. Analysis

Applying the above principles, we conclude the issues identified by Lenora's expert are not sufficient to create a reasonable belief of a constitutional violation of the fair cross-section requirement. We reach this conclusion because Dr. Weeks's theories are in large part premised upon social or economic factors that, for constitutional purposes, are outside the realm of matters that a county must consider when applying a

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<sup>14</sup> *Brady v. Maryland* (1963) 373 U.S. 83.

jury selection system based on neutral criteria. Further, some of his concerns have already been ameliorated, are speculative, or—given the amount of the suggested disparity—do not warrant imposing a constitutional duty on the County.

As noted, the County's use of DMV and voter registration lists to create its master jury list is a judicially and legislatively sanctioned method of selecting jurors in a random, neutral fashion reflective of a cross-section of the community. (*People v. Ochoa, supra*, 26 Cal.4th at p. 427; Code Civ. Proc., § 197, subd. (b).)<sup>15</sup> Thus, Lenora has an augmented burden to show a reasonable belief in a violation of his fair cross-section rights. Specifically, he must establish a reasonable belief that application of the neutral criteria is the probable cause of the disparity and that it is *constitutionally impermissible*. (*People v. Jackson, supra*, 13 Cal.4th at p. 1194; *People v. Sanders, supra*, 51 Cal.3d at p. 493.) Lenora has not met this burden.

Dr. Weeks contends that because cognizable groups are less likely to register to vote, they are less likely to be duplicated on the source list and thus less likely to receive summonses and appear for service. This showing is inadequate to justify discovery because a cognizable group's tendency not to register to vote is a social problem that generally need not be addressed by a county for purposes of the cross-section

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<sup>15</sup> Code of Civil Procedure section 197, subdivision (b) states: "The list of registered voters and the Department of Motor Vehicles' list of licensed drivers and identification cardholders resident within the area served by the court, are appropriate source lists for selection of jurors. These two source lists, when substantially purged of duplicate names, shall be considered inclusive of a representative cross section of the population, within the meaning of subdivision (a)."

constitutional requirement. (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 427-428.)

Likewise, Dr. Weeks's thesis that a group's failure to respond to jury summons is likely derived from economic or social issues such as low income and age does not show a reasonable belief in a constitutional violation. Where, as here, a county applies a neutral procedure for jury selection, it is generally not called upon to take extra measures to try to ameliorate social conditions that impact the cross-section. On this record, we see no reason to deviate from these principles.

Dr. Weeks's opinions related to the elimination of jurors because of excuses are also insufficient to require discovery. To a large extent, this thesis challenges the use of hardship excuses specifically authorized by the California Code of Civil Procedure and California Rules of Court. A county's even-handed application of statutorily-designated excuses does not provide a basis to support a constitutional challenge based on the fair cross-section requirement. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1160; *People v. Danielson*, *supra*, 3 Cal.4th at p. 706; *People v. Burgener*, *supra*, 29 Cal.4th at pp. 857, 862.)

Moreover, Dr. Weeks acknowledged that since the County altered its method for classifying excuses, the number of people on the master jury list has increased from 800,000 to 1.2 million. This largely eliminates Dr. Weeks's concern that too many people were being eliminated prior to the creation of the master jury list.

To the extent Dr. Weeks questioned the County's proper handling of the excuses submitted by summoned jurors, this challenge is based on his assessment that it is unlikely that 65 percent of summoned prospective jurors qualify for the statutorily-

defined excuses.<sup>16</sup> But he submitted no details to support this view, and on this record it amounts to mere speculation. This speculation is insufficient to carry Lenora's burden to show a reasonable belief of a constitutional violation.<sup>17</sup>

Similarly, the fact that the County has a courthouse in both South Bay and downtown, and that a higher percentage of Hispanics live in the South Bay area and thus may be serving at a higher rate at this location than at the downtown location, does not show a reasonable belief of a constitutional violation. The submitted evidence suggests Hispanics *do* appear at the downtown courthouse in significant numbers; i.e., the jury venires on September 18 and 19, 2006, consisted of 12 percent and 9 percent Hispanic-surnamed persons, respectively, which (based on a 19 percent jury-eligible Hispanic population) created an average absolute disparity of 8.5 percent. Thus, the record does not suggest the disparity is so egregious that it might require, as a constitutional imperative, that the County consider population densities and courthouse locations when applying its neutral selection procedures. (See *People v. Ramirez*, *supra*, 39 Cal.4th at p. 446; *People v. Burgener*, *supra*, 29 Cal.4th at p. 860.)

Lenora's citation to *United States v. Rodriguez-Lara*, *supra*, 421 F.3d 932 is not persuasive. In *Rodriguez*, the Ninth Circuit held that the defendant was entitled to

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<sup>16</sup> The granted excuses actually constitute 60 percent of the summoned jurors. (See fns. 9 & 11, *ante*.)

<sup>17</sup> In his briefing on appeal, Lenora argues the record shows the County violates the rules governing the granting of excuses. He briefly cites various items of testimony without placing the information provided by the witness in its full context and without fully explaining the basis of his assertions. His arguments on this point are unpersuasive.

appointment of an expert to evaluate the district court's jury selection procedures. (*Id.* at p. 946.) The federal judicial district at issue in *Rodriguez* used *only* voter registration lists to summon jurors, and the defendant showed a 14.55 percent absolute disparity in Hispanic representation. (*Id.* at pp. 937, 944.) Here, the County uses *both* voter registration and DMV lists to summon jurors, and the disparity calculated based on surnames showed an 8.5 percent absolute disparity in Hispanic representation. Given these distinctions, the conclusion in *Rodriguez* does not apply here.

Lenora additionally contends that he was entitled to disclosure of information under the Public Records Act. (Gov. Code, § 6250, et seq.) Although he included this argument in his written motion filed with the trial court, on appeal he has not cited to anything in the record showing that this matter was considered or ruled upon by the trial court. We decline to consider this issue for the first time on appeal. (See *People v. Braxton* (2004) 34 Cal.4th 798, 813 [failure to request ruling constitutes forfeiture of issue on appeal].)

Because Lenora did not show a reasonable belief in a constitutionally impermissible application of the County's neutral selection criteria, the trial court did not err in denying his discovery motion. Although we uphold the trial court's denial of discovery, our conclusion is not meant to discourage any efforts to monitor or improve the cross-section of the community in the jury venire.

## II. Sentencing Issues

Lenora's 10-year sentence consisted of (1) a five-year upper term for count one (transportation of cocaine base, Health & Saf. Code, § 11352, subd. (a)); (2) a

consecutive three-year term for a count one enhancement for having suffered a prior drug-related conviction (Health & Saf. Code, § 11370.2, subd. (a)); and (3) a consecutive two-year term for two prior prison term enhancements.

The trial court imposed a concurrent five-year term for count two (sale of cocaine base, Health & Saf. Code, § 11352, subd. (a)). The court stayed the sentence under Penal Code section 654 for count three (possession of cocaine base for sale, Health & Saf. Code, § 11351.5). As to the remaining enhancements, the trial court either dismissed them, or stayed them under Penal Code section 654.

*A. Trial Court Was Not Required to Stay Sentence on Count Two*

Lenora challenges his concurrent sentence for count two sale of cocaine base. He asserts the sentence on count two should have been stayed under Penal Code section 654 because his transportation and sale of cocaine base were part of the same course of conduct.

When a defendant sustains multiple convictions arising out of a single act or indivisible course of conduct, Penal Code section 654 permits only one punishment for the defendant's conduct. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Whether a course of criminal conduct is divisible so as to allow multiple punishment depends on whether the defendant had a separate criminal objective for each offense. (*Ibid.*) If the defendant acted with only one objective, the defendant may be punished for only one offense, and sentence on the other offenses must be stayed. (*People v. Deloza* (1998) 18 Cal.4th 585, 592; *People v. Liu, supra*, 46 Cal.App.4th at p. 1135.) However, if the defendant acted with multiple, independent criminal objectives, the defendant may be

punished for each of those objectives even though the violations share common acts or were parts of an otherwise indivisible course of conduct. (*People v. Liu, supra*, at p. 1135.) The issue of whether the defendant entertained multiple criminal objectives is a question of fact for the trial court, and is reviewed on appeal under the substantial evidence standard. (*Id.* at pp. 1135-1136.)

Lenora engaged in two distinct criminal acts concerning cocaine base: one, he aided and abetted Johnson in the sale of cocaine base to Officer Wilson; and two, he hid an additional quantity of cocaine base under the bumper of the Jeep. Based on these distinct acts, the trial court could reasonably find that Lenora had the objective of selling the cocaine base transferred by Johnson, and that he had an independent objective of transporting the cocaine base that he hid under the bumper.

Lenora cites *People v. Lopez* (1992) 11 Cal.App.4th 844 to support his position that the sentence on count two should have been stayed. In *Lopez*, the defendant was convicted of both offering to sell cocaine (count one) and transporting cocaine (count two) based on his course of conduct in response to an undercover police operative's request to purchase cocaine. The trial court stayed sentence on count two. (*Id.* at pp. 845-847.) On appeal, the defendant asserted he could not be convicted of both counts one and two. (*Id.* at p. 847.) Rejecting this argument, the *Lopez* court stated that although the defendant's "criminal activities were directed to the single goal and objective of selling two kilograms of cocaine to [the police detective]," he could properly be convicted of both offenses as long as punishment on count two was stayed. (*Id.* at p. 850.)

Here, unlike the facts in *Lopez*, Lenora completed the sale of cocaine base to the undercover officer, and then engaged in additional conduct showing he retained cocaine in his possession. This supports a finding that he entertained two objectives: one, to sell cocaine base to Officer Wilson, and two, to transport a separate quantity for other purposes. (See, e.g., *In re Adams* (1975) 14 Cal.3d 629, 632-633, 636 [defendant could properly be punished for both transportation and sale of drugs under circumstances where portion of drugs was retained by defendant's accomplice]; *People v. Blake* (1998) 68 Cal.App.4th 509, 512 [multiple punishment permissible where evidence showed intent to deliver drugs to different persons].)

Based on the evidence supporting a finding of multiple criminal objectives, the trial court was not required to stay the sentence on count two.

*B. Status Enhancements on Counts Two and Three Must be Stricken*

When a defendant is convicted of a specified drug-related offense, Health and Safety Code section 11370.2, subdivision (a) (section 11370.2 (a)) requires a three-year sentence enhancement for each prior specified drug-related conviction. Because section 11370.2 (a) is a status enhancement related to the defendant and not to the current offense, it is imposed only once to aggregate the defendant's sentence. (*People v. Tillotson* (2007) 157 Cal.App.4th 517, 542.) Once a status enhancement term is added to the defendant's sentence for one count, any duplicative status enhancements alleged in other counts should be stricken. (*Ibid.*; see *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1163-1164.)

For each of the three charged counts, Lenora was charged with four section 11370.2 (a) enhancements based on his four prior drug-related convictions. These alleged enhancements were found true. At sentencing, for count one the trial court imposed one section 11370.2 (a) three-year enhancement. The court struck the three remaining section 11370.2 (a) enhancements for count one, stating that it was exercising its discretion under Penal Code section 1385 to dismiss the three additional enhancements because "of the lack of violence or predatory behavior" in Lenora's background and because he was mistakenly released from jail but nonetheless appeared for trial. For counts two and three, the trial court stayed the sentences on the four section 11370.2 (a) enhancements attached to each of these counts, stating that they were barred under Penal Code section 654 given the use of the enhancement in the count one sentence.

Lenora argues the trial court erred in staying the sentence on, rather than striking, the section 11370.2 (a) enhancements for counts two and three. We agree. A section 11370.2 (a) enhancement is to be added one time to determine the defendant's aggregate sentence for all counts. Although a total of four section 11370.2 (a) enhancements could have been imposed based on Lenora's four prior drug-related convictions, the trial court exercised its discretion to strike three of these enhancements when ruling on count one. Because the trial court added the enhancement term when it sentenced on count one, the identical enhancements for counts two and three should have been stricken, not stayed.

Although agreeing the enhancements should not have been stayed, the Attorney General argues that the matter should be remanded for resentencing because it is not clear that the trial court intended to impose only one of the four permissible section 11370.2 (a)

enhancements. The record does not support this contention. When making its sentencing choices, the trial court stated, "I realize that statutorily speaking, I would be fully justified and could amply support imposing the maximum term, with allegations, of 22 years. I'm going to—I'm sure to the consternation of the People—impose substantially less than that because I have taken seriously the things that you've said, the things that your attorney has said."<sup>18</sup> This statement, as well as the trial court's specification of factors supporting its discretionary striking of three of the section 11370.2 (a) enhancements, shows that the trial court consciously selected the 10-year sentence as the appropriate sentence although it understood it could have selected a longer overall sentence. It is clear the trial court wanted to use only three of the 12 years available under section 11370.2 (a) to enhance Lenora's sentence.

The four section 11370.2 (a) enhancements for counts two and three shall be stricken from the judgment.

*III. No Prejudice from Trial Court's Failure to Consider Lenora's Claim of  
Ineffective Assistance of Counsel Made at Sentencing Hearing*

At sentencing, Lenora addressed the trial court, stating that he wanted a hearing to consider his claim that he received ineffective assistance of counsel. Lenora explained

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<sup>18</sup> The probation officer had recommended a 22-year sentence as follows: five years for the upper term for count one; 12 years under section 11370.2 (a) for count one based on the four prior drug-related convictions; and five years for five prior prison terms. Instead, the trial court selected a 10-year sentence, striking three of the four section 11370.2 (a) enhancements for count one and striking three of the five prior prison term enhancements.

that he told his attorney that the money found in his possession at the time of his arrest was not "drug money"; that the money belonged to his wife; and that his wife had paperwork to prove this. He argued that his counsel should have, but did not, present this evidence at trial. The trial court responded that Lenora could raise this issue on appeal but that he could not do so at the sentencing hearing.

Lenora argues the trial court should have treated his statements as a request for a new trial based on ineffective assistance of counsel, and the court should have held a *Marsden*<sup>19</sup> hearing to decide if new counsel should be appointed to present a new trial motion.

A defendant may raise a claim of ineffective representation in a postconviction motion for new trial. (*People v. Smith* (1993) 6 Cal.4th 684, 693; *People v. Winbush* (1988) 205 Cal.App.3d 987, 991; see *People v. Cornwell* (2005) 37 Cal.4th 50, 101, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The new trial motion may be made, either orally or in writing, at any time before the entry of judgment on the sentence. (Pen. Code, §§ 1182, 1200, 1201; *People v. Simon* (1989) 208 Cal.App.3d 841, 847; *People v. Braxton*, *supra*, 34 Cal.4th at p. 807, & fn. 2; *People v. Jaramillo* (1962) 208 Cal.App.2d 620, 625-627.) When the defendant requests a new trial based on a claim that his counsel was incompetent at trial, the trial court should hold a *Marsden* hearing to determine if new counsel should be appointed to

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<sup>19</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

address the defendant's concerns. (*People v. Smith, supra*, 6 Cal.4th at pp. 692-693, 695-696.)

If the trial court failed to hold a *Marsden* or new trial hearing to resolve a defendant's claim of ineffective assistance, the reviewing court may remand the case for a hearing on these issues. (*People v. Mejia* (2008) 159 Cal.App.4th 1081, 1087-1088; *People v. Eastman* (2007) 146 Cal.App.4th 688, 699; *People v. Kelley* (1997) 52 Cal.App.4th 568, 580; *People v. Braxton, supra*, 34 Cal.4th at p. 818.) However, remand is not necessary if there was no prejudice to the defendant. (*People v. Mack* (1995) 38 Cal.App.4th 1484, 1487; *People v. Braxton, supra*, 34 Cal.4th at p. 818.) For example, there was no prejudice if the record shows the failure to hold a *Marsden* hearing was harmless beyond a reasonable doubt (*People v. Mack, supra*, 38 Cal.App.4th at p. 1487), or if the record shows the new trial motion lacked merit as a matter of law or the trial court would have denied the new trial motion and this ruling would not have been an abuse of discretion (*People v. Braxton, supra*, 34 Cal.4th at p. 818).

Here, the record shows no prejudice from the trial court's failure to hold a *Marsden* and/or new trial hearing. Lenora stated in open court the reason he believed his counsel was ineffective. Thus, the basis of his dissatisfaction was revealed even though no *Marsden* hearing was held. Further, the record shows as a matter of law that a new trial motion based on the issue identified by Lenora would not have been meritorious.

A defendant is entitled to a new trial for ineffective assistance of counsel if the defendant shows counsel's performance was deficient under prevailing professional norms and there is a reasonable probability that but for counsel's failings the result would

have been more favorable to the defendant. (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) There is no reasonable probability the jury would have reached different verdicts on the charged offenses of cocaine base transportation, sale, and possession for sale even if it had been presented with evidence showing the \$401 cash found in Lenora's possession was not money used in narcotic-sales transactions. At trial, Officer Wilson described his encounter with Lenora during which Lenora, standing by a Jeep, accepted the money from Esser and directed Esser to Johnson, and Johnson transferred cocaine base to Esser. Officer Day described his observation of Lenora placing a baggie containing an additional amount of cocaine base and the prerecorded money under the Jeep's bumper. If the jury credited the officers' description of these events, the evidence of guilt was overwhelming regardless of the cash found in Lenora's possession. Although the \$401 cash was a factor that could support guilt, evidence that the cash was *not* acquired from drug sales had no direct bearing on whether the officers were telling the truth about their observations. Under these circumstances, there is no reasonable probability that evidence regarding the source of the cash would have caused the jury to reject the officers' testimony establishing Lenora's guilt of the charged crimes.

Because Lenora identified the source of his dissatisfaction with counsel's performance and a new trial motion based on his complaint would have lacked merit as a matter of law, there is no need to remand the case for a *Marsden* or new trial hearing.

#### DISPOSITION

The judgment is modified to strike the four section 11370.2 (a) enhancements for counts two and three. As so modified, the judgment is affirmed. The trial court is

directed to prepare an amended abstract of judgment reflecting this modification and to forward a copy to the Department of Corrections and Rehabilitation.

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HALLER, J.

WE CONCUR:

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BENKE, Acting P. J.

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NARES, J.